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HAROLD B. WILLEY

Nos. 480-481

IN THE

Supreme Court of the United States

October Term 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

No. 481

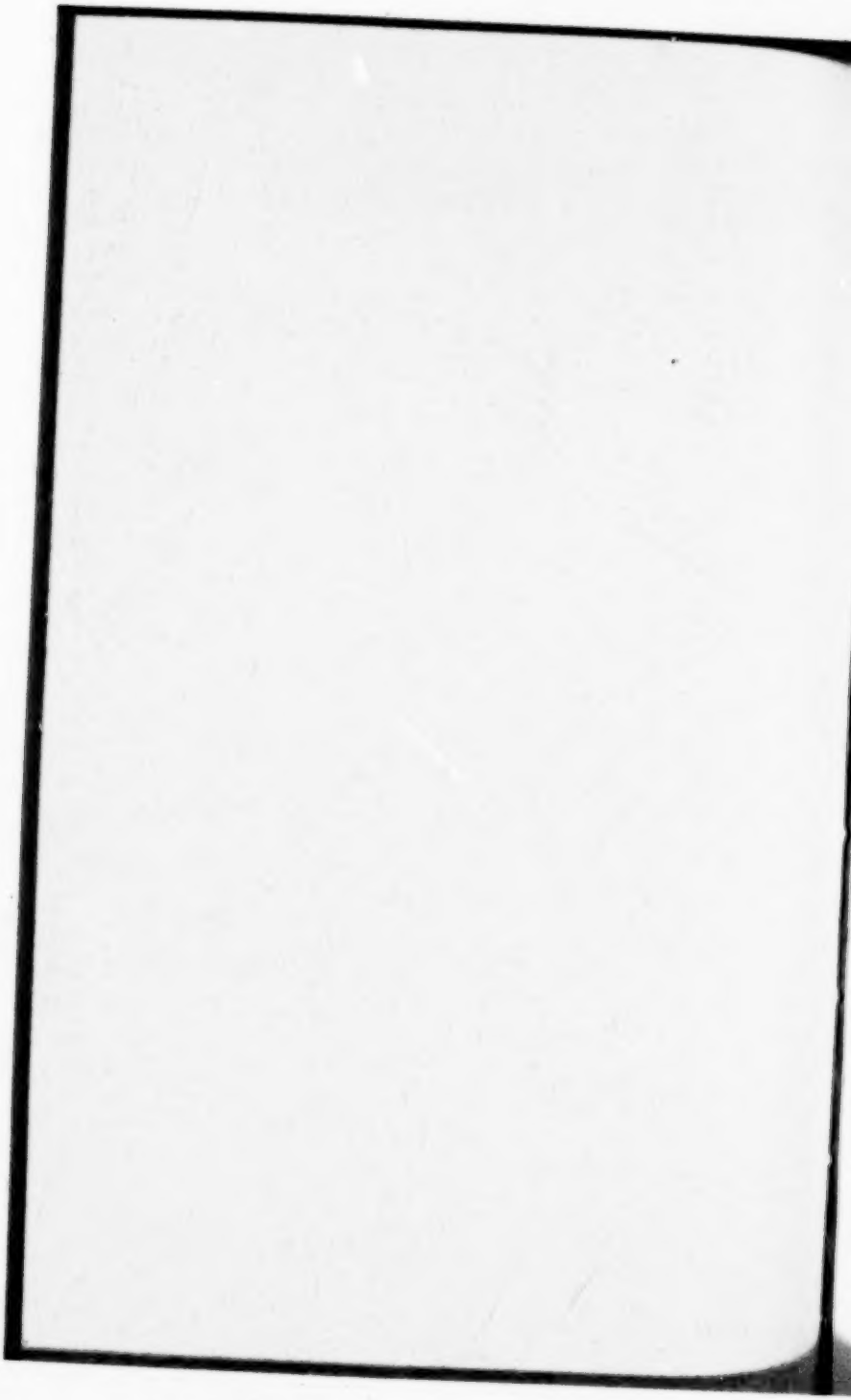
FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF AMERICA, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and READING COMPANY, APPELLEES



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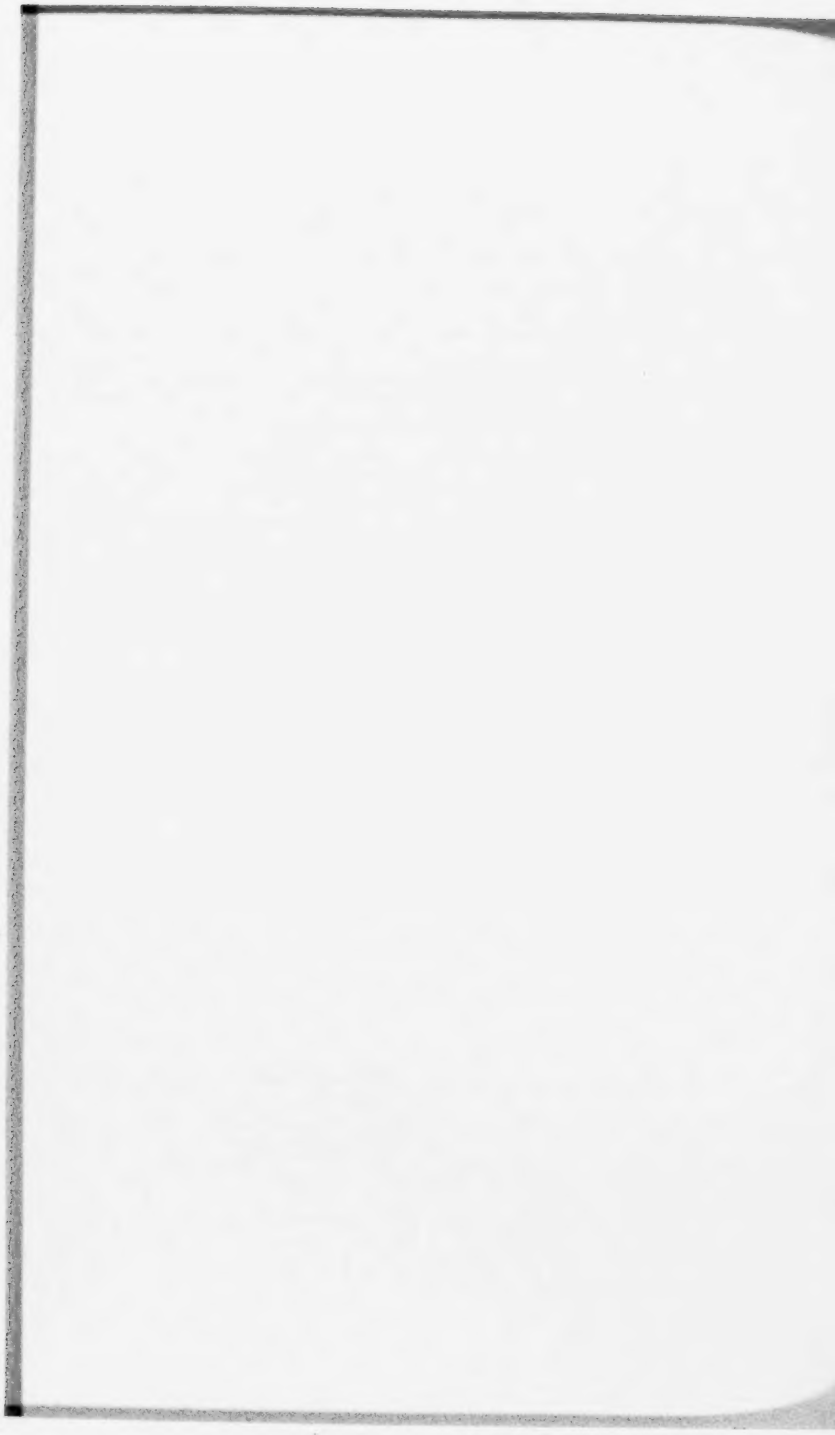
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OPINIONS BELOW

The opinions in the District Court (R. I-208-215, 204-207) are reported in 114 F. Supp. 420. The original report of the Interstate Commerce Commission (R. I-24-24s) is reported at 272 I.C.C. 648, and its re-

port on rehearing and further hearing (R. I-23-23gg) is reported at 286 I.C.C. 119.

JURISDICTION

The judgment of the District Court dismissing this suit to set aside orders of the Interstate Commerce Commission (R. I-203-204) was entered on August 31, 1953. Separate appeals (1) by the Secretary of Agriculture of the United States and (2) by the remaining plaintiffs and the intervening plaintiffs in the original action, were allowed on October 28, 1953. R. I-220-221. Motions to affirm in both appeals were filed on November 27, 1953, by the Interstate Commerce Commission and by the intervening railroads. Probable jurisdiction was noted on February 1, 1954, and the two appeals were ordered consolidated for argument. R. III-1555. Jurisdiction of the appeals is invoked under U.S.C., Title 28, Secs. 1253 and 2101(b).

QUESTION PRESENTED

The Interstate Commerce Commission, after extended investigation and hearing, approved the imposition by five rail carriers of charges in addition to the line-haul rates for unloading fresh fruits and vegetables at certain designated stations on the island of Manhattan and in Philadelphia. The question presented is whether the Commission's orders approving the charges have a basis in law and are supported by substantial evidence.

STATUTE INVOLVED

The pertinent sections of the Interstate Commerce Act involved in these appeals are set out at pages 94-101 of appellant's brief in No. 480, and at pages 65-69 of appellants' brief in No. 481.

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STATEMENT

A. The Proceedings Before The Commission:

In 1947 the five railroad appellees* filed schedules proposing to establish, effective June 1, 1947, charges for the unloading of carload shipments of fresh fruits and vegetables at certain designated stations at New York, New York, and Philadelphia, Pennsylvania. Following protests, the Commission suspended the operation of the proposed schedules for the full statutory seven months' period—until December 31, 1947—and instituted an investigation into their reasonableness and lawfulness. See R. I-224. Evidence was taken before an Examiner, the case was argued before Division 3, and reargued before the full Commission. R. I-14, 24a. The statutory suspension period having expired in the meantime, the carriers voluntarily deferred the effective date of the schedules pending determination of the proceeding. R. I-24a.

On October 4, 1948, the full Commission made its initial report in which it concluded, first, that there was no showing that the proposed schedule of charges created an unjust discrimination or undue prejudice in violation of either Sections 2 or 3 of the Interstate Commerce Act, and second, that the proposed schedule of charges was just and reasonable. R. I-24q-24r. The Commission thereupon entered an order vacating the suspension and discontinuing the proceeding. R. I-224. The proposed charges, increased 30 percent to reflect general increases authorized in the interim, became effective November 1, 1948. R. I-23a.

Upon petitions for reopening and reconsideration filed by several of the appellants herein, the proceed-

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* The Baltimore and Ohio Railroad Company, Erie Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company.

ing was reopened (R. I-292-293), a rehearing was held for the receipt of additional evidence, a proposed report was served, exceptions thereto were filed, and the matter was again argued orally to the full Commission. R. I-23a. On October 10, 1950, following the reargument, the Commission assigned the matter for still further hearing in order to remedy deficiencies which appeared to exist in the record. R. I-293-294. Following that hearing, a supplemental proposed report was prepared, exceptions were filed, and the matter was orally argued for the fourth time. R. I-23a. On May 7, 1952, the Commission filed a Report on Rehearing and Further Hearing in which it concluded that the unloading charges previously approved should be reduced so as not to exceed certain specified amounts, and modified its ultimate finding in the prior report accordingly. R. I-23a, 23bb. The order accompanying this report, which incorporated by reference the findings of fact and conclusions contained in the Commission's two reports (R. I-25, and see R. I-23b), required cancellation of the tariff schedules naming the unloading charges and discontinued the proceeding without prejudice to the establishment of the reduced charges in the amounts so specified. R. I-25, 23bb-23cc.

B. The Reports Of The Commission:

The facts as found by the Commission in its two reports may be summarized as follows:

The general rule is that shippers must load and unload carload freight, or make provision therefor, at their own expense, and that where loading or unloading of such freight is done by the carrier a charge is made. R. I-23c, 24b. Rule 27 of the Consolidated Freight Classification provides, in part, as follows (R. I-23c):

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> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."

Prior to 1924, the railroads in Official Territory* made exceptions to this general rule at certain inland points and port cities. R. I-24c. Beginning in that year, however, the carriers began to eliminate the exceptions by publishing tariffs assessing a charge for loading or unloading at several of the inland points. Following the approval of those tariffs by the Commission in 1925 (*Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925)), loading and unloading by the carriers without charge** was gradually discontinued at other interior and port cities in Official Territory until finally New York and Philadelphia remained the sole exceptions. R. I-24c. At the time of the first report of the Commission in 1948, those two cities were the only points in Official Territory where unloading of carload freight was performed by the carriers without a separate unloading charge, and even at those cities such unloading service was not performed generally but only at certain specified stations therein or at designated platform locations in such specified stations. R. I-24c, 24h, 24j, 23s.

The charges here in issue apply only to the unloading of fresh fruits and vegetables at certain designated

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* Roughly, the area east of the Mississippi and north of the Ohio and Potomac Rivers.

** The terms "without charge" or "free" will be used in this brief as meaning without charge in addition to the line-haul rate.

stations on the island of Manhattan and in Philadelphia.* There are other commodities consigned to Philadelphia and to the New York pier stations which were also unloaded without charge in addition to the line-haul rate (R. I-23e-23f, 23h), but since fruits and vegetables constituted the bulk of the shipments received and unloaded without separate unloading charge at New York and at the Philadelphia perishable produce terminals, it was considered appropriate to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. R. I-24b. The Commission also took note of the fact that the carriers were considering the establishment of similar charges for the unloading operations of all commodities at New York and Philadelphia. R. I-24b. In fact, in 1950, the carriers imposed such

* The unloading charges which were originally proposed (R. I-23b) were increased, before they became effective on November 1, 1948, as a result of the general increase authorized by the Commission in Increased Freight Rates, 1947, 269 I.C.C. 33 (1947), 270 I.C.C. 81, 95, 403 (1947). R. I-23b. No further increases in the charges were authorized by the Commission in the later general increases authorized in 1948 and 1951. In its last report, the Commission approved the reduced schedule of charges which is now in effect. R. I-23bb. The details, on a per ton basis, are as follows:

Products	Proposed Charges	Charges as Effective 11/1/48	Present Charges
Citrus fruits	$1.50	$1.95	$1.05
Fresh fruits (other than citrus)	1.75	2.28	1.35
Melons (including cantaloupes)	2.00	2.60	1.65
Vegetables, fresh or green, not cold pack or frozen	1.50	1.95	1.05
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00	2.60	1.65

There has been no objection to the grouping of commodities in this fashion. R. I-23c.

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charges on the balance of the carload freight theretofore unloaded at Philadelphia without extra charge. R. I-322. See *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The schedule of unloading charges, both as originally proposed by the carriers, and as finally approved by the Commission, was identical for New York and Philadelphia. The Commission approval of this feature of the charges was based on the long-standing competitive relationship between those cities. R. I-23bb, 24c. The physical situations at the two cities, however, are dissimilar. Because of the geographical location of New York, freight consigned to that point must generally be moved across the Hudson River, either by car float or by lighter; only the New York Central has an all-rail line into Manhattan for the delivery of freight (R. I-23f), although that company also has a New York pier station in the vicinity of Barclay Street to which cars must be transported on platform floats. R. I-23f, 24h. At Philadelphia, since 1927, all the movements have been by rail. R. I-23r.

At New York

There is a large and fairly steady volume of fresh fruits and vegetables received by railroad in New York each year. About 75 percent of these shipments are delivered at pier stations of the Erie, Pennsylvania, Baltimore & Ohio, and New York Central located on the west side of Manhattan Island between Barclay and Canal Streets, near the Washington Market, the primary fruit and vegetable market for the entire New York metropolitan area. R. I-23e, 24d. The remainder

is delivered to team tracks and sidings, or to chain store warehouses, in other parts of the city. R. I-23e. It is principally at the pier stations where unloading is performed by the carriers; hence it is principally with respect to the operations there that there is controversy regarding the unloading charges.*

The operations of the Erie are typical of the pier operations at New York. R. I-24g. Carloads of fruit and vegetables, received by it generally at points in Indiana, proceed by rail to the Erie rail terminals in Jersey City, New Jersey. There they are moved onto car floats equipped with tracks and transported by Erie tugs across the Hudson River to Piers 19, 20 or 21, the pier stations leased by the Erie from the City of New York. R. I-24d. All of these operations are performed in the late afternoon and at night in order to meet the needs of the market for the following day. R. I-23g, 24d. At the pier stations the cars are unloaded, onto the floor of the pier, by a contractor, the Seaboard Terminal and Refrigeration Company, employed by the Erie. The Erie itself supplies the necessary unloading equipment, such as hand trucks, gangplanks, and the like; provides light, heat, and maintenance of the piers; supplies the necessary clerical and supervisory force for the unloading operations; and either by its own employees or through the Seaboard Terminal, keeps the piers clean and sanitary. The unloading is performed with a high degree of speed and efficiency; two and sometimes three car floats are un-

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* The New York Central also performs the unloading with respect to cars which move by rail or via float bridge to its freight house located near the Bronx Terminal Market. R. I-24h.

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loaded at the same pier space in the course of a single night. R. I-23f-23h, 24d-24g.

The Erie is informed, prior to the arrival of the cars, of their contents and the names of the consignees which permits it to notify the receivers in advance of the arrival of the cars, and to allot space on the piers for each consignment. The pier floor is mapped out to give each consignee a specified location for the contents of the car after unloading. Many shipments are displayed by the consignees at those locations to facilitate inspection by prospective purchasers. Practically all of the fruit, after being inspected on the piers by prospective purchasers, is sold at public auction in rooms on the second floor of the pier which are provided by the Erie for that purpose. Some of the produce, particularly cantaloupes and melons, is bought at private sale after being inspected on the pier floor, and some, particularly vegetables, reaches the consignee without prior sale at the piers. R. I-23j-23k, 24f-24g. The consignees, or the purchasers, truck the produce from the pier to its ultimate destinations in New York City. R. I-23k, 24i. Thus, in taking pier station delivery, the fruit and vegetable trade has advantages not available in connection with team-track delivery, including the displaying of the entire contents of the car, the use of the pier facilities as a sales mart, and the use of auction-room facilities. R. I-23d, 23h.

When delivery is to be on a team track on Manhattan Island, the movement (except by the New York Central) is identical across the Hudson River. R. I-23i. When the car floats reach Manhattan the cars are switched and placed on the team tracks, where the consignee himself does the unloading. R. I-23i. The cost to the carriers of delivery on team tracks is, of course,

substantially less than the cost of delivery at the pier stations when unloading at the pier stations is included.*

The team-track capacities of the carriers on Manhattan Island range from 45 cars on the part of the Baltimore & Ohio, to 350 for the New York Central. R. I-23f. These team tracks are largely used for delivery of non-perishable freight, but some shippers specify such delivery for fruits and vegetables. If all receivers of fruits and vegetables at New York desired team-track delivery on Manhattan, the existing facilities would not be sufficient, and it would be impracticable, if not impossible, to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. R. I-23f, 23n, 23q. However, most shippers have preferred and hence have specified delivery at the special pier station terminals provided for the receipt of perishable freight (R. I-23q, 24l), and in the judgment of the Commis-

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* The relative costs to the carriers, on a per car basis, of team-track and pier station delivery on Manhattan Island are not spelled out for each carrier in the Commission's findings. The findings of the Commission show that, *apart from the costs of unloading*, the relative costs are: New York Central—team tracks, $22.30, pier stations, $38.02 and $43.94 (depending on where the car float is loaded); Erie—team tracks, $45.44, pier stations, $44.30, with an estimated additional unloading cost of $39.57 at the pier stations. *When unloading at the piers is included*, the costs for the Baltimore and Ohio are—team tracks, $70.46, pier stations, $119.86, and for the Pennsylvania—team tracks, $73.57 and pier stations, $122.73. R. I-23o. The exhibits, however, show that in 1950, the composite costs of all carriers of handling cars at the Manhattan piers, including unloading, were $90.11 per car, and at the Manhattan team tracks were $30.40 per car. The details and the references to the supporting exhibits are tabulated at R. I-450.

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sion shippers will not divert any substantial amount of this traffic from the pier stations so long as they are able to obtain the present terminal services at costs which are not unduly burdensome or unduly disproportionate as compared with the costs of a satisfactory substitute for such delivery. R. I-23z.* Additional team-track facilities are available on the New Jersey side of the Hudson River, which are accessible by tunnel or ferry from New York. R. I-23h-23i, 23k-23l.

When delivery is to be at the pier stations, it is impracticable for the consignees to do the unloading, and they are not permitted to do so. R. I-23e, 24i. There are no physcial means by which consignees' trucks can reach the car floats, and the carriers refused a request by one consignee following the original decision by the Commission in 1948 approving the original, higher schedule of unloading charges, that the consignees be permitted to perform the unloading. R. I-23h. Consignees do, of course, have access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight there. R. I-23g-23h.

The carriers made studies of the costs incurred by them in connection with this unloading operation at the piers. These cost studies were attacked before the Commission on various grounds, but the Commission concluded that they were carefully prepared and were

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* The New York Central, which has the largest team-track capacity and which in 1950 handled 12,144 cars of fruits and vegetables at team tracks and only 1,888 at pier stations (R. I-23q), has asserted that its team-track facilities can accommodate all cars of fruits and vegetables which it may transport to New York (R. I-24h), although it could not handle the total volume of fruit and vegetable shipments to that point by all carriers. R. I-23f.

sufficient to prove the facts. R. I-24p. They show for 1947 the following weighted average costs per ton of the carriers which made delivery in this way, as compared with the charges then proposed (R. I-24s):

Product	Costs of Unloading	Proposed Charges
Citrus fruits	$1.25	$1.50
Fresh fruits (other than citrus)	1.76	1.75
Melons	1.90	2.00
Vegetables (not iced)	1.94	1.50
Vegetables (iced)	3.42	2.00

The latest cost figures, for 1949, and the charges ultimately approved by the Commission and now in effect, are as follows (R. I-23j):

Product	Costs of Unloading*	Present Charges
Citrus fruits	$1.99	$1.05
Fresh fruits (other than citrus)	3.11	1.35
Melons	3.02	1.65
Vegetables (not iced)	2.075	1.05
Vegetables (iced)	3.26	1.65

At Philadelphia

Prior to 1927, fresh fruits consigned to Philadelphia were unloaded at piers on the Delaware River adjacent to the Dock Street wholesale produce market, the cars being either floated to the piers or moved to them over the city streets. Unloading was by the carriers, without extra charge. This operation, which was similar to the present pier operation in New York City, was changed in 1927, when the Pennsylvania and the Baltimore and Ohio each constructed a perishable

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* These figures are the arithmetical averages of all four carriers calculated from the separate figures given at R. I-23j. All are for a given period in 1949 (although somewhat different periods for each carrier) except that the figures for the Erie are the 1946 and 1947 figures revised to reflect the increases in the wages of Seaboard Terminal employees through March 1951. R. I-23j.

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produce terminal. Since that time, and until the unloading charges became effective in 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania produce terminal. R. I-23r.

This terminal, in addition to team-track facilities for 510 cars, has two platforms with a combined capacity of 72 cars; it is only at these platforms that the Pennsylvania does the unloading. R. I-23r-23s, 24j. About one third of the total volume of these shipments is unloaded by the Pennsylvania at these platforms, and the balance on the team tracks by the consignees. R. I-24l. One of the two platforms, known as platform "A", is used almost entirely for the unloading of fruits to be sold at auction by the Philadelphia Terminal Auction Company. When produce to be sold by the auction company is about to arrive at Philadelphia, the auction company receives orders from the receivers relating to the commodities it will offer for sale the next morning. The auction company, in preparation for these sales, prints a catalogue for prospective purchasers, and the Pennsylvania, when it unloads the cars, sorts and arranges their contents according to size, grade, brand, or other factors as listed in the catalogue. No charge is made for this special sorting service. R. I-23s, 24j-24k.* The Pennsylvania also provides auction rooms for the conve-

* At New York, when the carrier is requested by the consignee to sort the packages, either as they are unloaded or after they have once been stacked on the pier, a separate charge is made pursuant to appropriate tariff authority. Allowances for Stacking, 179 I.C.C. 780 (1931).

ience of the trade, as well as heat and light for the terminal. R. I-24k.*

Platform "B" is used for fruits and vegetables intended for private sale. The cars are unloaded by the railroad employees, but they do not perform the sorting of freight which they do on Platform "A".

When cars are spotted at the team tracks, the consignees do their own unloading. The Pennsylvania maintains in Philadelphia not only extensive team tracks at the produce terminal, but additional team tracks at other locations in the city. R. I-24j. There is no indication that these facilities are inadequate to accommodate the entire fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services, and the team-track facilities can be increased if necessary. In fact, delivery at the terminal platforms with their auction and other facilities is more advantageous to the consignees (R. I-23y) and, including the cost of unloading, much more expensive to the carriers.**

The unloading costs at Philadelphia are somewhat less than at New York (R. I-23d), although they increased substantially between 1947 and 1949. R. I-24s, 23x. A comparison of the Philadelphia costs with the charges approved by the Commission and with

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* Operations at the joint Baltimore and Ohio and Reading terminal, which is nearby, are substantially identical. R. I-23s-23t, 24k-24l.

** For the Baltimore and Ohio, the costs per car are—team tracks, $27.66, auction sales platform, $75.94; for the Pennsylvania —team tracks, $39.64, auction sales platform, $109.36. R. I-23o-23p.

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those presently in effect, on a per ton basis, follows (R. I-24s, 23x):*

Product	Unloading Costs 1947	Unloading Costs 1949	Present Charges
Citrus fruits	$1.04	$1.57	$1.05
Fruits (other than citrus)	1.41	2.03	1.35
Melons	1.10	3.42	1.65
Vegetables (not iced)	0.98	1.91	1.05

Following the additional hearings in this proceeding in 1949 and 1950, the Commission took note of the effect of the unloading charges, which had been in effect since November 1, 1948. At New York, the Commission noted that when the unloading charges became effective, some consignees took delivery at outlying team-track stations, particularly in New Jersey, trucking from there to the market. R. I-23h-23i. Deliveries of fresh fruits and vegetables at the piers were about 50 percent less in February 1949 than in the corresponding month in 1948, with substantial increases in truck delivery from team tracks in New Jersey. R. I-23i. However, the Pennsylvania had spent a large sum in extensive reconditioning of its New Jersey team tracks, and to a large extent their increased use was not the result of the unloading charges. R. I-23k. The Commission noted that the delivery of fresh fruits and vegetables at team tracks in New Jersey, away from the produce markets and the area where the bulk of the produce is consumed, would not only be somewhat slower, but would tend to split the New York metropolitan area. R. I-23k-23l. The Commission also took note of "intimations" and "apprehensions" that the loading charges might interfere with programs by the city of New York to rehabili-

* The 1947 figures are weighted average costs per ton. Figures for 1949 are the arithmetic averages of the separate figures for the Pennsylvania and the Baltimore and Ohio given at R. I-23x.

tate the piers and the Washington Market, and of the temporary abandonment, due to the unloading charges, of plans by the Port of New York Authority to construct a union water front terminal combining into one integrated operation all of the pier stations of the several carriers. R. I-23m-23n.

In Philadelphia, the Commission found that after the original unloading charges became effective in 1948, 63 percent of the produce originally delivered on the terminal platforms was unloaded on team tracks by consignees (R. I-23t), and concluded that the charges at the 1948 levels would accentuate the trend toward diversion of shipments to trucks which has been manifest, with certain fluctuations, since 1930. R. I-23u-23w. The consignees at Philadelphia, shortly after the unloading charges first became effective in 1948, requested the carriers to permit the auction company to do the unloading, believing that they could do it for less than the unloading charge. The Pennsylvania refused, on the ground that the terminal platforms were public facilities and that it could not permit dual methods of unloading. R. I-23v.

C. The Commission's Conclusions:

Both reports of the Commission begin with a statement of the general principle, embodied in Rule 27 of the Consolidated Freight Classification, that owners are required to load and to unload carload freight. R. I-23c, 24b.

In its first report the Commission concluded that it was not convinced that adequate compensation for the unloading services at the designated stations at New York and Philadelphia "is or should be included in the line-haul rates" and that the establishment of specific charges for unloading at those points without reference

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to the levels of the line-haul rates was justified. R. I-24q. The Commission described the charges as falling "in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." R. I-24q.

The Commission also considered the contention that the unloading charge was an undue preference and an unjust discrimination under Sections 2 and 3 of the Act. It found that the carriers had not yet imposed an unloading charge on other freight which may be delivered at the New York piers (R. I-23e-23f), but that the circumstances and conditions affecting the unloading of these other commodities were not shown to be similar (R. I-24r) and, moreover, as already stated, it recognized that the carriers were considering imposing similar unloading charges for all freight delivered at Philadelphia and at the Manhattan piers. R. I-24b.

The Commission's second report, which it regarded as supplemental to the first (R. I-23b), was in large part devoted to a discussion of the consequences of the charges originally approved, as disclosed by experience, and to the arguments made by those protesting the charges in relation to the available alternative methods of receiving freight at Philadelphia and New York.

In dealing with the situation at Philadelphia the Commission concluded that there was no indication that the team-track facilities provided there are inadequate to accommodate the fresh fruit and vegetable traffic or that anyone desiring team-track delivery had been denied such services. The Commission further specifically concluded that "except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce termi-

nals in addition to those unloaded at the team tracks." R. I-23y.

In discussing the unloading charges at New York the Commission concluded in part as follows (R. I-23y-23z):

> "An unusual situation, arising primarily from the topography of the area, exists on lower Manhattan as a result of which the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. The respondents have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased. Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the respondents."

The Commission rejected as unsound the argument that the carriers must bear the unloading costs because they do not have team tracks in New York adequate to handle all of the traffic, stating that the physical limitations imposed on the movement of produce by rail into Manhattan created a general community problem rather than exclusively a railroad problem. R. I-23z-23aa. It further concluded that although the Manhattan team tracks and sidings are not adequate to handle all the Manhattan traffic in fruits and vegetables there is little likelihood that shippers would divert a substantial amount of traffic from pier stations if the unloading charges were not unduly burdensome to them or unduly disproportionate as compared with the cost of a satisfactory substitute for pier deliveries. R. I-23z. The Commission also pointed out that if terminal costs can-

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not be kept within reasonable bounds the carriers might eventually be forced to undertake the establishment of team-track facilities in Jersey City within a reasonable trucking distance of lower Manhattan as a substitute for direct service to the latter area. R. I-23z-23aa.

The Commission also concluded that, inasmuch as the level of the line-haul rates on fresh fruits and vegetables to New York and Philadelphia was not higher than the rates to other consuming points where shippers unload or separate unloading charges are assessed, the propriety of the unloading charges could be determined without an extensive showing as to the reasonableness of the line-haul rates (R. I-23aa), thus reaffirming the similar conclusion reached in its first report.

On the other hand, the Commission modified its earlier conclusion by finding that the level of charges as established in 1948 would cause a considerable diversion of traffic. In the light of that, and of the various benefits to the carriers from pier delivery (R. I-23bb), the Commission concluded that only a lower basis of charges could be approved. R. I-23aa-23bb. These charges are about 60 percent of the charges which had been in effect since November 1, 1948 (R. I-23bb), and approximately half of the cost to the carriers of unloading, at Manhattan and Philadelphia combined, in 1949. R. I-23j, 23x.

In its second report the Commission considered anew the contention that the unloading charges violated Sections 2 and 3 of the Act and again concluded that there was no warrant for a finding that those sections were violated. R. I-23bb.*

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* Since June 1, 1950, there has been no unloading by the railroads at Philadelphia of other commodities except when a separate charge is made. R. I-322. See National Carloading Corp. v. Pennsylvania R. Co., 288 I.C.C. 481 (1953).

Accordingly, the Commission decided that the unloading charges then in effect had not been shown to be just and reasonable, and should be cancelled, but without prejudice to the establishment of charges in conformity with a schedule of unloading charges stated in its opinion, which it found would be just and reasonable. R. I-23bb.

D. Subsequent Commission Proceedings:

The order of the Commission directed that the unloading charges previously approved be cancelled by July 3, 1953. R. I-25. Pursuant to that order the carriers cancelled the charges on that date and filed new tariffs imposing at New York and Philadelphia the schedule of unloading charges which the Commission had approved. R. I-31, 37. On September 16 and 23, 1952, shortly after the final report of the Commission and the filing of these new tariffs, two formal complaints were filed with the Commission (Docket Nos. 31105 and 31106) attacking the unloading charges at New York and Philadelphia, respectively, as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act. See R. I-28, 35. The railroad defendants therein moved to dismiss the complaints (R. III-1541, 1546) and after responses to the motions had been filed (R. I-42-50), but without further hearing of testimony, the Commission dismissed the complaints on December 15, 1952, on the ground that they assailed on substantially the same grounds the unloading charges approved in the Commission report of May 7, 1952. R. I-26-27.

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E. The Proceedings In The Court Below:

On March 3, 1953, the complaints herein were filed in the District Court for the Southern District of Florida seeking to annul and set aside the order of May 7, 1952, insofar as it approved and authorized the establishment of the present unloading charges, and the order of December 15, 1952, dismissing the complaints filed with the Commission. R. I-1-178. Answers were filed (R. I-178-201), including one by the United States, named as a defendant pursuant to 28 U.S.C. Sec. 2322, in which it stated that it "should remain neutral in this case." R. I-199, 200-201. The railroads who are now appellees here sought and were accorded permission to intervene. R. I-202-203. In accordance with the requirement of 28 U.S.C. Supp. V., Sec. 2325, a three-judge court was empaneled, and on August 31, 1953, the complaints were dismissed. R. I-203-204.

The majority of the court (Strum, Circuit Judge, and Barker, District Judge), stating that the "point at which the carrier's line haul service begins or ends is a question of fact to be determined by the Commission" (R. I-212), concluded that the findings of the Commission were amply supported by the evidence, and warranted the Commission in concluding that "unloading by the carrier is a desirable and justifiable accessorial service, of value to the consignee, and that he should pay a part of the costs". R. I-214. The court denied that a prior custom of performing the additional service without charge was of controlling significance, or that it was necessary for the Commission to review in detail the line-haul rates before approving the unloading charges (R. I-213), particularly where the Commission also found that the level of the line-haul rates

to New York and Philadelphia is no higher than the rates to other consumer points where shippers unload or where charges are assessed for unloading. R. I-213. The court also held that there was there no denial of due process, in refusing to reexamine the propriety of the charges in connection with the complaints filed in 1952, or otherwise. R. I-214-215. District Judge de Vane dissented. R. I-204-207.

On October 28, 1953, appeals to this Court were allowed. R. I-220-221. Motions to affirm were filed on November 27, 1953, and probable jurisdiction was noted on February 1, 1954. R. III-1555.

SUMMARY OF ARGUMENT

I

The Court has consistently held that the decision of questions such as those here involved—the extent of the carriers' transportation duty and the obligations which the carriers assume in return for the payment of the line-haul rates—turns upon the appraisal of facts and that consequently the determinations of the Commission will be accepted if they are supported by substantial evidence. See, *e.g., Los Angeles Switching Case,* 234 U.S. 294, 311, 314; *Swift & Co.* v. *United States,* 316 U.S. 216, 225; *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186, 193. The Commission, in the exercise of its authority to determine the extent of the carriers' transportation duty, has recognized certain rules and principles, among which is the rule that shippers or consignees are obliged to do their own unloading of carload freight. The application of this principle to the facts of the present case is only the latest step in a long history of Commission action directed to the unloading practices of

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the carriers in Official Territory. By 1948 application of that principle had resulted in the elimination of unloading by the carriers without a charge in addition to the line-haul rates at all points in that Territory except New York and Philadelphia. The orders in the present case thus have substantially eliminated this practice at the last remaining points where it had continued to exist.

II

Appellants do not attack most of the findings and conclusions that support the Commission's determination. Their primary objection is that it was error for the Commission to approve separate charges for unloading without making a full-dress investigation of the reasonableness of the line-haul rates. Their contention is without substance.

A. The fact that the carriers have not imposed a separate unloading charge in the past does not establish either that the carriers' duty under the line-haul rates requires them to provide unloading without a separate charge or that compensation for the unloading service is presently included in the line-haul rates. *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98. Consistently in the past the Commission has permitted or required carriers to decrease or eliminate a part of the total quantum of terminal services previously performed under the line-haul rates without making a complete investigation of the reasonableness of those rates. *Loading and Unloading Carload Freight*, 101 I.C.C. 394 (1925); *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25 (1947); *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953); *Charges for Protective Service to*

Perishable Freight, 241 I.C.C. 503 (1940); *United States* v. *U. S. Smelting, Refining & Mining Co.,* 339 U.S. 186. In the present case the Commission's conclusion that unloading was not required of the carriers under the line-haul rates is supported by the evidence showing the special nature and value of the unloading services and the costs of performing those services. It is also supported by the evidence that the line-haul rates for fruits and vegetables to Official Territory are, from many origins, identical to wide geographical areas around both New York and Philadelphia, and do not vary depending on whether unloading is performed by the carriers. In thus determining the scope of the carriers' obligation under the line-haul rates the Commission also acted on the basis of its thorough familiarity with the general structure of the rates on fresh fruits and vegetables to points in Official Territory. There are no prior decisions of the Commission which are inconsistent with its conclusion in the present case.

B. The Commission's orders do not result in a charge for delivery. Appellants refuse to recognize that the carriers are simply making available at the perishable produce terminals in Philadelphia and at the pier stations on Manhattan Island a special type of terminal service, which has many advantages for a shipper or consignee, but which includes extra services by the carriers for which they are entitled to some reimbursement. That the services precede delivery is irrelevant. Likewise, since shippers and consignees prefer this alternative and more expensive type of delivery, it is irrelevant that the team tracks on Manhattan Island could not accommodate all of the traffic in these commodities. *Swift & Co.* v. *United*

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States, 316 U.S. 216, 227. At Philadelphia the team-track facilities are completely adequate and at New York the Commission properly concluded that the unusual physical conditions warranted some sharing between the carriers and their patrons of the burden of overcoming the difficulties in that congested area.

C. The objection, made only by appellant in No. 480, that the Commission erred in fixing the same level of charges at both New York and Philadelphia is without merit. The Commission has wide discretion in fixing the level of rates as between various designations, and the record is fully adequate to support its conclusion in the present case that the existing parity between these two cities should not be disturbed.

III

The challenge to the orders of the Commission under Sections 2 and 3 of the Act may not be available to appellants in the Court, but the objection is in any event without substance. Questions of discrimination, undue prejudice and the like are peculiarly within the province of the Commission, which has established well recognized standards of proof in such matters. Appellants failed to present evidence that satisfied those standards of proof. When the Commission in its first opinion advised appellants that the record before it wholly failed to meet those standards, appellants took no steps to meet that deficiency in their proof. The conclusion of the Commission that the record was inadequate to sustain any finding of violation of Sections 2 or 3 is clearly correct.

IV

Appellants' objection that they were not permitted a hearing on the final reduced level of charges was

completely answered in the court below, as was the similar objection that the Commission was required to reexamine all questions because of complaints filed subsequent to its final decision in these cases. The burden of proof required by the statute was imposed by the Commission. It did not err in disagreeing with the contrary conclusions reached by its Hearing Examiners, nor are the reports of those Examiners significant in this Court.

ARGUMENT

The Interstate Commerce Commission, in determining the legality of the unloading charges involved in this case, was required to resolve complex transportation problems which called for the exercise of its informed judgment and experience. Those problems arise both because of the nature of the traffic involved and because of the particular conditions existing at the destinations and stations at which the unloading charges apply. In a number of important respects the problems are peculiar to this case and cannot be resolved by reference to other situations or to general precedents; that is particularly true, for example, of the problems created by the situation existing on the island of Manhattan where physical conditions place severe practical restrictions upon the extent of the delivery and unloading services that may reasonably be required of rail carriers. In deciding this case it was necessary for the Commission not only to determine what the facts were but also to determine, on the basis of those facts and in the light of the practical problems that they created, what adjustment between the rights of carriers and shippers would be both fair and feasible.

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The Commission gave careful consideration to the facts, both before the unloading charges became effective and again after the charges had been in effect long enough for the Commission to form an opinion as to their probable practical consequences. Upon the basis of that appraisal, and in the light of the particular conditions existing at New York and Philadelphia, the Commission, in the exercise of its judgment, determined that a part of the cost of unloading fresh fruits and vegetables should be borne by the carriers and a part by the shippers. Accordingly, the Commission by its orders permitted the carriers to impose charges which reimburse them for part but not all of the cost of unloading at these two points.

Appellants attack the Commission's orders on a variety of grounds. Although these attacks purport to rest on asserted errors of law, analysis of appellants' arguments shows that in reality they are merely criticising the Commission for the way in which it has exercised its judgment on the transportation problems which Congress has authorized it to decide.

In reply to these arguments we shall show, first, that the Commission's orders in this case are an exercise of the Commission's undoubted jurisdiction to determine the extent of the carriers' transportation duty and of their obligations under the line-haul rates; second, that in exercising that jurisdiction the Commission made findings and conclusions that are fully supported by the evidence; third, that the Commission's orders create no preference or undue prejudice as among shippers or commodities within the meaning of Sections 2 or 3 of the Act; and, finally, that there is no substance in the various claims of procedural irregularity made by appellants. These matters will be considered in the subsequent sections of this brief.

I

THE ORDERS OF THE COMMISSION ARE AN EXERCISE OF ITS EXCLUSIVE JURISDICTION TO DETERMINE THE EXTENT OF THE CARRIERS' TRANSPORTATION DUTY AND THEIR OBLIGATION UNDER THE LINE-HAUL RATES

What is involved in this case is a question of the extent of the obligation of rail carriers to provide facilities and services at certain termini on Manhattan Island and in Philadelphia. That question, in turn, requires a consideration of both the extent of the carriers' transportation duty, and the obligations which the carriers assume in return for the payment of the line-haul rates. These are questions—whether they be phrased in terms of unloading or in terms of delivery, or in terms of terminal services generally—which have been committed by Congress to the Interstate Commerce Commission.

For many years this Court has held that the decision of such questions turns upon the appraisal of facts and that accordingly the determinations of the Commission will be accepted if they are supported by substantial evidence. *Los Angeles Switching Case,* 234 U.S. 294, 311, 314; *United States* v. *Wabash R. Co.,* 321 U.S. 403, 408; *Swift & Co.* v. *United States,* 316 U.S. 216, 225; *Armour & Co.* v. *Alton R. Co.,* 312 U.S. 195, 200. For example, in the *Los Angeles Switching* case, *supra,* the question before the Commission was whether the carriers were entitled to impose an extra charge for delivery of cars upon industrial spur tracks. The conclusion of the Commission that in the circumstances of that particular case the extra charge was unjustified was upheld by the Court. The opinion pointed out that the question whether delivery on industrial spur tracks is included in the line-haul rate

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"is a question of fact to be determined according to the actual conditions of operation" and was "manifestly one upon which it is the province of the Commission to pass". 234 U.S. at p. 311.* Again, in *Swift & Co.* v. *United States*, 316 U.S. 216, the Commission determined that rail carriers satisfied their obligations under the line-haul rates by delivering livestock into suitable pens at a public stockyard, even though the shipper was thereafter required to pay a yardage charge to the stockyard company in order to obtain egress for the livestock from the pens. This Court affirmed the Commission's order, stating its opinion that the question of the carrier's obligation was one to be decided "by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law." 316 U.S. at p. 225.

The same principle has been applied by the Court in a long line of cases involving the validity of Commission orders resulting from its investigation of another aspect of delivery practices, *i.e.*, the switching of cars on industrial tracks or the making of allowances to shippers who do such switching for themselves. *Ex Parte No. 104, Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11 (1935). In these cases the Commission has been repeatedly and uniformly sustained by the Court in ordering the carriers to refrain from performing, without an extra charge, services which the Commission has determined to be beyond the proper scope of the line-haul rates (or in making allowances

* At points in their argument appellants seem to take the position that this decision lays down an absolute and universally applicable rule of law as to what constitutes proper delivery under the line-haul rates. This is not correct. The Court regarded the question as one of fact to be determined by the Commission on the basis of the particular circumstances presented.

for such services when performed by shippers or consignees). See, *e.g., United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186; *Goodman Lumber Co.* v. *United States,* 301 U.S. 669; *A. O. Smith Corp.* v. *United States,* 301 U.S. 669; *United States* v. *Pan American Petroleum Corp.,* 304 U.S. 156; *United States* v. *Wabash R. Co.,* 321 U.S. 403; *Hanna Furnace Corp.* v. *United States,* 323 U.S. 667; *Corn Products Refining Co.* v. *United States,* 331 U.S. 790.*

In *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186, the most recent of these cases, this Court repeated with approval (at p. 193) the state-

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* The reports of the Commission itself reflect numerous other situations in which, without any subsequent judicial review of its orders, it has exercised its authority to determine the scope of the carriers' obligation under the line-haul rates. Sometimes the issue is whether the carriers should be required, as in the Ex parte 104 cases, to impose special charges for special services. Thus special loading, unloading, sorting and split delivery services, without charges in addition to the line-haul rates, were condemned by the Commission in Freight Forwarding Investigation, 229 I.C.C. 201 (1938). The furnishing of special storage facilities, without charge in addition to the line-haul rates, was condemned in Propriety of Operating Practices — New York Warehousing, 198 I.C.C. 134 (1933). The sorting and stacking of freight, without a charge in addition to the line-haul rate, was condemned in Allowances for Stacking, 179 I.C.C. 780 (1931). Sometimes the issue is whether the special charges published by the carrier for special services are warranted. Thus additional charges for bracing and blocking have been repeatedly approved. Dunnage Allowances, 30 I.C.C. 538 (1914); Blocking and Staking Lumber, 168 I.C.C. 37 (1930); Berg Industrial Alcohol Co. v. Reading Co., 142 I.C.C. 161 (1928); Bracing Charges at North Atlantic Ports, 279 I.C.C. 623 (1950). Or again, the issue may be presented by the elimination of special services. Thus the Commission has authorized carriers to abandon, or to impose an additional charge for, pick-up and delivery services

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ment in *United States* v. *Wabash R. Co.*, 321 U.S. 403, 408:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

In the exercise of this authority to determine the extent of the carriers' transportation duty and of their obligation under line-haul rates, the Commission has recognized certain general rules or principles. One of these general rules or principles is that shippers or consignees are obligated to do their own unloading of carload freight. The report of the Commission in this proceeding states (R. I-23c):

> "As regards carload freight the general rule is that shippers and consignees must perform the loading and unloading or make provisions therefor at their own expense."

This principle is embodied in Rule 27 of the Consolidated Freight Classification, which contains the

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without a compensating reduction of the line-haul rates. Pick-up and Delivery Cancellation in New England, 277 I.C.C. 745 (1950). See also Pickup and Delivery on Interterritorial Traffic, 284 I.C.C. 551 (1952); Pickup and Delivery Charges in Official Territory, 288 I.C.C. 555 (1953). In the case last cited, the Commission authorized a charge of 10 cents per hundred pounds for either pick-up or delivery service, in addition to the line-haul rate, even though that charge was substantially lower than charges then being made by some of the carriers for those services, and despite the fact that in some cases no charge whatever had been made for such services.

basic rules governing the respective rights and obligations of the shipper, carrier and receiver. See R. I-23c. See also *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U.S. 446, 453; *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U.S. 319, 323.

The Commission's application of this principle to the facts of the present case is the latest step in a long history of Commission action directed to the unloading practices of the carriers in Official Territory. Despite the general rule that shippers and consignees have the obligation to load and unload carload freight, the carriers in Official Territory, because of competitive conditions, for many years followed the policy of loading and unloading carload freight at a number of points, including such important locations as New York, Philadelphia, Chicago, Baltimore, Pittsburgh, Buffalo and St. Louis, without making a separate charge for the service.

In 1914, in *The Five Per Cent Case*, 31 I.C.C. 351, 408 (1914), the Commission directed the carriers in Official Territory to ascertain the extent to which these services constituted an unjust burden upon the carriers or resulted in an unjust discrimination among shippers.* Although efforts by the carriers to reduce this free loading and unloading during the next decade came to naught by reason of the inability of the carriers to cooperate on the matter (see *Loading and Unloading Carload Freight*, 101 I.C.C. 394, 398 (1925)), in 1924 the carriers discontinued the practice

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* A year later, in 1915 Western Rate Advance Case, 35 I.C.C. 497 (1915), the Commission again made the same point (p. 630): "Special services in particular localities should be paid for by special charge and the cost not distributed generally among all the rates upon a commodity."

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of free loading and unloading by publishing charges for such services at a number of inland points. The unloading charges were challenged before the Commission, on grounds essentially similar to those now advanced, and were sustained. *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925). An increase in the loading and unloading charges at inland points was approved by the Commission in 1947. *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947).

Following the Commission's decision in 1925, separate charges for loading and unloading were published by the carriers at more and more points. At the ports, however, elimination of loading and unloading without separate charge was delayed by the competition of water carriers, which generally load and unload at their own expense. R. I-24c. The Commission continued to express its interest. In *Freight Forwarding Investigation,* 229 I.C.C. 201 (1938), the Commission not only directed the carriers to revise their tariff charges to reflect the cost of loading and unloading forwarder traffic (p. 237), but generally commented (p. 302):

> "Practices which encroach upon respondents' revenues and impair their ability to render efficient service to the public must be condemned. * * * If extraordinary services are to be performed appropriate charges should be established for them."

See also *Emergency Freight Charges,* 215 I.C.C. 439, 464 (1936). By 1948, New York and Philadelphia remained the only points in Official Territory where loading or unloading was performed without a charge in addition to the line-haul rates. R. I-24c. In that

year the charges here involved eliminated the major items which had been unloaded at those points without an additional charge, and in 1950 the last vestige of unloading without charge was eliminated at Philadelphia, with the approval of the Commission. R. I-322. See *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

Thus it appears that the Commission's order in this case, viewed in the light of this Court's decisions on similar Commission orders and against the background of prior Commission action, is a normal and proper exercise by the Commission of its authority to decide on the basis of the facts before it a transportation question of the kind that Congress has committed to its jurisdiction. Under the rules of judicial review established by this Court the Commission's order accordingly should be sustained if it is supported by evidence. That question will be considered in the next section of this brief.

II

THE COMMISSION'S ORDERS ARE SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED

Appellants do not attack many of the findings and conclusions that support the Commission's determination. They do not question the findings of the Commission describing the nature and extent of unloading services performed by the carriers in New York and Philadelphia. They do not challenge the findings of the Commission as to the costs incurred by the carriers in performing those unloading services, nor do they deny that the loading charges approved by the Commission are substantially less than the costs incurred by the carriers in performing the unloading

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services.* They do not attack the Commission's findings that the unloading services benefit the shippers and consignees as well as the carriers. They do not question the Commission's conclusion that there is no proof that the team-track facilities at Philadelphia are inadequate to handle the fresh fruit and vegetable traffic at that point, or its further conclusion that there is no proof that any one desiring team-track delivery there has been denied such service. They do not attack the Commission's conclusion that it would not be feasible for the railroads to provide on the island of Manhattan team-track terminal service adequate to handle all of the traffic in fresh fruits and vegetables, and it is clear from appellants' arguments that they are not in fact interested in having team-track delivery for all this traffic. Nor do appellants question the Commission's conclusion that there is little likelihood that shippers would divert any substantial amount of such traffic from pier stations to team tracks as long as the shippers are able to obtain the present terminal services at costs that are not unduly burdensome to them or not unduly disproportionate as compared to total costs to them of a satisfactory substitute. They do not suggest that there is lack of evidentiary support for the Commission's reference to the possibility that if terminal costs are not kept within reasonable bounds the railroads may eventually be forced to substitute team-track delivery in Jersey City for all direct service to the island of Manhattan. And finally, appellants do not deny that the Commission, on the basis of its appraisal of the

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* At the rehearing by the Commission in 1951, appellants refused even to cross-examine witnesses who testified to the costs of the unloading service performed by the carriers at New York and Philadelphia, asserting that those costs were in their view irrelevant. See R. III-1246-1247.

facts, determined that the costs of the unloading services at the particular stations involved should be shared between the carriers and the shippers.

These matters, since they are not contested, may be laid aside and the discussion confined to appellants' principal objection to the validity of the Commission's order. This objection is, in substance, that it was error for the Commission to approve separate charges for unloading without making a full-dress investigation of the reasonableness of the line-haul rates. In support of this broad position the appellants make several subsidiary contentions: they assert that the line-haul rates must be deemed to include compensation for unloading because for many years the carriers made no separate unloading charge; that the charge approved by the Commission is not a charge for unloading but a charge for the delivery which is required of the carrier under the line-haul rates; and that since the Commission did not determine whether line-haul rates should be *pro tanto* reduced its order in this case requires the shippers to pay twice for the same services.

It is these contentions that we shall examine in the next two sections of this brief.

A. THE COMMISSION WAS NOT REQUIRED TO INVESTIGATE THE REASONABLENESS OF THE LINE-HAUL RATES AS A PREREQUISITE TO ITS APPROVAL OF THE UNLOADING CHARGES

In this case the Commission concluded that the unloading charges "are in substantially the same category as those for switching, transit, refrigeration and various other special services, for which separate charges are published"; that it was not convinced that adequate compensation for the unloading services "is or should be included in the line-haul rates"; and that the establishment of specific charges for unloading

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without reference to the levels of the line-haul rates was justified. R. I-23aa, 24q-24r.* These conclusions were fully supported by the substantial evidence before the Commission showing the special nature of the unloading services performed at the pier stations in Manhattan and at the produce terminal in Philadelphia, the cost of performing those services, the alternative services available to shippers, the benefits accruing to the shippers by reason of the unloading services, and also by the evidence showing that the level of the line-haul rates to Manhattan and Philadelphia is no higher than the rates to other points where shippers unload or charges are assessed for unloading.

As we have pointed out, this evidence for the most part is not controverted by appellants. Instead, to support their contention that the Commission erred, appellants rely almost altogether upon one circum-

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* Appellants argue that in its second report the Commission abandoned these conclusions and instead treated the charges as imposed on *delivery* and not *unloading*. This is a misreading of the Commission's reports. In its second report, the Commission did not abandon or modify the findings or conclusions stated in its first report. It regarded its second report as supplemental to the first, stating that "the facts stated in the prior report will be repeated herein only to the extent necessary to a clear understanding of the issues" (R. I-23b), and in the order entered on the second report the Commission incorporated by reference all of the findings and conclusions of the first report. R. I-25. The second report did not hold that the charges were charges for delivery. The findings in both reports show that the Commission regarded the act of unloading as separable from delivery and the charges as charges for unloading and not for delivery. See pp. 56-57, *infra*. The appellants' argument to the contrary rests solely on statements in which the Commission recognized that in the particular situation involved delivery followed unloading. The fact that delivery follows unloading does not mean that the charge imposed is a charge for delivery. See p. 57, *infra*.

stance, *i.e.*, that for many years the carriers had performed the unloading services at the pier stations on Manhattan Island and at the produce terminal in Philadelphia without imposing a separate charge. Appellants argue that this establishes that compensation for the unloading services is included in the line-haul rates and that accordingly no separate charge for that service can be imposed unless the Commission first determines whether the line-haul rates should be *pro tanto* reduced.*

The fact that the carriers have not imposed a separate unloading charge in the past does not establish either that the carriers' duty under the line-haul rates requires them to perform unloading without a separate charge or that compensation for the unloading services is presently included in the line-haul rates. In *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98, the carriers imposed a terminal charge of $2.00 for the delivery of carloads of livestock at the Union Stock Yards in Chicago. For many years prior to the imposition of this charge the carriers had made these deliveries under the line-haul rates. The

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* The appellant in No. 480 erroneously contends that the Commission found "that the line-haul rates included, prior to this proceeding, compensation for unloading" (appellant's brief, No. 480, p. 36). The Commission made no such finding, as the passages quoted in appellant's brief show. The Commission merely found that prior to November 1948 no separate charges in addition to the through rates were made for the unloading services at the pier stations in Manhattan and the produce terminal in Philadelphia. This is not a finding that compensation for the service before that time was included in the line-haul rates. On the contrary, the Commission expressly found that it was not convinced that compensation for the unloading service was included in the line-haul rates. R. I-24q.

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Commission, although finding that the terminal charge as such was reasonable, struck it down on the ground that the terminal charge taken together with the line-haul rates made the total rate to the shippers unreasonable.* This Court set aside the Commission's order on the ground that the carriers were entitled to make a separate terminal charge and that if the charge as such was reasonable it could not be attacked on the basis that the charge, together with the line-haul rate, resulted in a total charge that was unreasonably high, the Court saying that in those circumstances it was the line-haul rate and not the terminal charge that should be corrected.** In its opinion this Court said (215 U.S. at p. 105):

> "If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal

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* At the time of the Commission's order, the line-haul rates were either at the same level they had been in the past or were higher than the level prevailing in the past. See Cattle Raisers' Association v. C. B. & Q. R. R. Co., 12 I.C.C. 507, 510-512 (1907).

** The arguments made in support of the Commission's order in that case included some of the same arguments that appellants urge here. Thus it was contended that the terminal charge merely increased the cost to the shipper of the same service, formerly performed under the line-haul rates, that the through rate already included compensation for the terminal service, and that to uphold the charge would be to permit the railroads to charge twice for the same service. See the summary of argument of counsel in 215 U. S. at pp. 99-102.

> charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust."

Appellants assert that it cannot be assumed that the railroads in the past "gratuitously" performed the unloading service. This is beside the point. In the past the costs of the unloading service may have been recouped out of the general revenues of the carriers or, since the same rates applied to points both in Manhattan and in Philadelphia and elsewhere in Official Territory where no unloading services were performed, the costs may have been recouped out of rates paid by shippers who did not receive unloading services. The evidence offered by the carriers showed that the rates were not formulated or constructed to include compensation for such services, because the rates to points at which no unloading service was performed, or where a charge was made for unloading service, were the same as the rates to the pier stations in Manhattan and the produce terminal at Philadelphia. See pp. 46-50, *infra*. The appellants cannot overcome the probative force of this evidence merely by asserting that the carriers in the past must have received from some source revenue that covered the costs of the unloading services.*

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* Appellants cite Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U.S. 320, to support the assertion that there is a "presumption" that the line-haul rates included adequate compensation for services rendered at the point of delivery. That case involved the same terminal charge at the Chicago stock yards which the Court passed upon in its later decision in Interstate Commerce Commission v. Stickney, 215 U.S. 98. In the earlier case, in discussing whether the change made by the carriers in their

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The consistent practice of the Commission in the past has permitted or required carriers to decrease or eliminate entirely a part of the total quantum of terminal services previously performed under the line-haul rates without making a complete investigation of the reasonableness of those rates. The most clearly analogous prior proceeding, of course, is that which arose in 1924 when the carriers in Official Territory cancelled the long-standing practice of free unloading of carload freight at many inland points. ***Loading and Unloading Carload Freight,*** 101 I.C.C. 394 (1925). The protestants made the same argument which they now urge here; the Commission's report states (p. 413) that the protestants—

> "particularly urge that the line-haul rates include loading and unloading, and that under the law respondents not only have to justify the charge

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tariffs was sufficient to separate or segregate the terminal charge, the Court remarked that the prior through rate " * * * in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stock yards." In the instant case there was, of course, no such "absence of proof to the contrary". On the contrary, there was evidence that the level of the line-haul rates in the past did not depend upon whether the unloading service was performed.

Furthermore, the decision in Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U.S. 320, did not hold that because the carriers had imposed no separate unloading charge in the past the Commission was required to investigate the reasonableness of the line-haul rates if it wished to authorize a separate terminal charge for the future. On the contrary, as we have pointed out above, in the Stickney case the Court held that the same terminal charge, since it was in itself reasonable, could be imposed even though the level of the line-haul rates remained unchanged.

> for those services but the burden is upon them to show that the line-haul rates heretofore contemplating the loading and unloading services are reasonable when demanded by respondents for the road haul alone."

The Commission there, as in the present proceeding, denied that the carriers were obliged to demonstrate, or that the Commission was obliged to make a re-evaluation of, the continued reasonableness of the line-haul rates. It said (p. 413):

> "Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assesed on shipments to and from industrial sidings or outlying team tracks at those points although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading. All of those facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading services, they have borne their burden of proof under the law."

The same argument was again made, and again rejected by the Commission in 1947. *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947). At that time the protestants urged that since the existing unloading charges had been set by the Commission at less than the actual cost to the carriers of the unloading operations, there must be

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deemed to be some portion of the unloading charge included in the line-haul rate, and accordingly the increase in the unloading charges at issue in that proceeding could not be approved without a full reexamination of the reasonableness of the line-haul rate. The Commission again disagreed (p. 31):

> "The line-haul rates which apply are the same as those which apply on traffic where no loading or unloading service is performed; and those which apply on protestants' traffic also apply on traffic of other shippers and on traffic of forwarders which perform their own service. They apply on that traffic regardless of whether or not a loading or unloading service is performed. * * * While it is true that neither the present nor the proposed charges are completely compensatory in and of themselves, it does not necessarily follow that in determining the lawfulness thereof, lawfulness of the line-haul rates also, from which the carrier must recoup losses that result from performances of the loading or unloading services, must be established."

The contention was again rejected in 1953. *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The termination of free unloading service is, of course, not essentially different than the termination of the free industrial switching service which is in issue in the *Ex parte 104* proceedings, and the same contention can be made that the Commission must reexamine the reasonableness of the line-haul rate before ordering the imposition of reasonable charges, or the termination of rebates, for such switching services. In the most recent of such cases, precisely that contention was made. *United States* v. *U. S. Smelting,*

Refining & Mining Co., 339 U.S. 186. The line-haul tariffs, it was there urged, had long specifically stated that the rate included certain terminal movements for weighing, sampling and the like, and that the requirement by the Commission that the industries bear the cost of such switching, absent a re-examination of the line-haul rates, "would require the appellee-smelters to pay twice for the same service". 339 U.S. at p. 197. The Court, however, stated (p. 198): "We think that the Commission has authority to exclude rate questions from this proceeding." *Interstate Commerce Commission* v. *Stickney,* 215 U.S. 98, 105, is to the same effect.

The same contention as now advanced by appellants has also been rejected by the Commission in connection with the imposition of charges for refrigeration. *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503 (1940). In that proceeding the shippers, like appellants here, insisted that since refrigeration had been provided in the past, new and separate charges for refrigeration could not be approved by the Commission without an investigation of the adequacy of the line-haul rates to compensate the carriers for the refrigeration service. The argument was rejected, Commissioner Eastman stating (241 I.C.C. at p. 515):

> "The question is whether, in order to effect a change in methods of charging which is clearly logical and desirable and the only practicable means of adjusting the charges fairly to the actual service furnished, it is necessary under the law to follow the procedure for which the protesting shippers contend and which would impose an intolerable burden upon all concerned in comparison with the results to be achieved. We believe that

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the law must take into consideration the necessities of a practical and reasonable administration of our regulatory duties and that the procedure for which the protesting shippers contend is not necessary in the circumstances."

In the present case, the Commission proceeded in precisely the same way as it has in past proceedings. In its last decision, it found, as of "major importance" that "the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading", and stated that accordingly it did not require "an extensive showing" with respect to the reasonableness of the line-haul rates. R. I-23z-23aa. In its earlier opinion in 1948, it had stated (R. I-24q):

> "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates. In prescribing or approving rate adjustments for fresh fruits and vegetables, however, these terminal services have usually been considered in connection with the rates to widespread destination areas. The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading.
>
> "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates."

It thus appears that in this case the Commission did not ignore the question of the relationship between the line-haul rates and the unloading services which were

at issue. It considered that relationship and decided that the evidence did not support the conclusion that the line-haul rates compensated the carriers for the unloading services. In appraising this evidence the Commission applied the same principles it has applied in the past to similar situations.

In its decision in *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925), the Commission stated that the primary test for determining whether an unloading service is or is not included within the line-haul rates is the way in which the line-haul rates are constructed, and where they have been formulated without special reference to the unloading service, the Commission may properly conclude that they do not include that service.

In the present case, many of the rates on fresh fruits and vegetables to New York and Philadelphia had been prescribed or approved by the Commission, and it was thoroughly familiar with the general structure of the rates to Official Territory on such commodities.* The opinions of the Commission dealing

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* The reports of the Commission contain many decisions prescribing or approving rates on fresh fruits and vegetables from various parts of the United States to Official Territory. See, *e.g.,* Georgia Peach Growers Exch. v. A.G.S. R. R. Co., 139 I.C.C. 143 (1928) (peaches from Georgia and the Carolinas); Florida R.R. Commissioners v. A. & R. R. R. Co., 144 I.C.C. 603 (1928) (citrus fruit from Florida); Mississippi Valley Shippers Bur. v. Aberdeen & R. R. Co., 173 I.C.C. 616 (1931) (various vegetables from Mississippi); Florida Railroad Commrs. v. Aberdeen & R. R. Co., 177 I.C.C. 735 (1931) (various vegetables from Florida); California Growers' & Shippers' Protective League v. S. P. Co., 185 I.C.C. 299 (1932) (deciduous fruits from Pacific states); South Carolina Produce Assn. v. Aberdeen & R. R. Co., 186 I.C.C. 199 (1932) (vegetables from Carolinas); Southeastern Vegetable Case, 200

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with these rates indicate that it has not relied on the unloading service as a matter of rate-making importance in determining what the line-haul rates should be. The situation in that respect is analogous to the situation before the Commission in *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503 (1940). That case dealt with the validity of new and separate charges for refrigeration; the protestants cited, as appellants do here (brief for appellant in No. 480, pp. 39-44) earlier cases before the Commission in which, as the Commission described them (p. 511) "it was quite customary for the carriers, when line-haul rates on perishable traffic were under consideration, to lay stress of record upon the refrigeration service afforded, as a special service characteristic of the traffic and entitled to consideration". The occasional and ancient instances cited by appellants in which the

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I.C.C. 273 (1934) (vegetables from the South); Southwestern Vegetable Case, 200 I.C.C. 355 (1934), 209 I.C.C. 606 (1935) 214 I.C.C. 63 (1936) (vegetables and cantaloupes from the Southwest); Mississippi Vegetable Shippers Bureau, 200 I.C.C. 355, 378 (1934) (vegetables from Mississippi); Vegetables and Avocados, South to Official Territory, 269 I.C.C. 409 (1947) (vegetables and avocados from the South); Transcontinental Rates, Estimated Weights, Vegetables, 270 I.C.C. 665 (1948) (vegetables from Transcontinental Territory); Estimated Weights on Lettuce from the Southwest, 276 I.C.C. 647 (1949) (lettuce from Southwest); Texas Citrus & Veg. Growers & Shippers v. A., T. & S. F. Ry., 79 I.C.C. 671 (1950); 284 I.C.C. 206 (1952), sustained *sub nom.* B. & O. R. Co. v. United States, 345 U. S. 146 (1953) (fruits and vegetables from Southwest). Moreover, the Commission, having a knowledge of the actual as well as the prescribed or approved rates, was fully aware that in many cases competition with truck or water carriage had forced the rail carriers to establish reduced rates on traffic of this sort. The situation is described by the Commission in Official-Southern Divisions, 287 I.C.C. 497, 531, 534 (1953). See also B. & O. R. Co. v. United States, 345 U. S. 146, 149.

unloading services at New York and Philadelphia have been mentioned in proceedings before the Commission fall far short of the situation described by the Commission in the refrigeration case, but even there the Commission refused to ascribe any importance to such references, saying (241 I.C.C. at p. 515):

> "So far as the rates which we have prescribed are concerned, we know, for the reasons already stated, that in most cases there was no evidence before us on which we could have included compensation for any part of the refrigeration service, and that where evidence in regard to such service was submitted it was of such a character that its influence on our decision could only have been slight and imponderable. We also know that, since these rates were prescribed, conditions relating to the operating expenses, taxes, and other burdens of the carriers have materially changed. * * *"

Indeed, the evidence in the record as to the nature of the rate structure to Official Territory makes it apparent that the unloading service could not have been significant in the line-haul rates. The Commission itself points out (R. I-23aa, 24q) that the line-haul rates do not vary depending on whether or not an unloading service is provided. From many origins, the same rates apply to all points within wide geographical areas around both New York and Philadelphia. From the Pacific Coast states (Transcontinental Territory), for example, the identical rates on fresh fruits and vegetables apply not only to both New York and Philadelphia, but also to the whole of New England, almost all of New York, eastern Pennsylvania, New Jersey, Delaware, Maryland and most of Virginia and West Virginia. See Exhibit 4

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(not printed).* Yet at no stations in that entire area except New York and Philadelphia did the carriers do the unloading without a charge in addition to the line-haul rates. Similarly, the rates from Florida are the same to Wilmington and Camden as to Philadelphia, and the same to Newark and Trenton as to New York, and the rates from Texas are the same to Scranton and Camden as to Philadelphia and the same to Trenton and the Delmarva Peninsula as to New York. On various fruits and vegetables from other origin points in the large producing areas of the United States, the rates applicable to New York and to Philadelphia apply also to extensive areas, yet at only New York and Philadelphia of all the stations in those areas was unloading performed by the carriers without an additional charge. See Exhibits 5-12 (not printed).

Indeed, the point can be made even more graphically. The carriers operate many stations at New York and Philadelphia. The unloading charges challenged here are applicable only at the specified stations or locations at those terminals where the carriers undertake to provide an unloading service—to move the freight from inside the car to assigned locations on the platform of those stations. The request for such delivery is made either by the designation of the station at which the shipment is to be delivered, as at the pier stations on Manhattan Island, or by special instructions to the agent at the destination station, as at Philadelphia where the same station provides both a

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* Reference to this and other unprinted portions of the record before the Interstate Commerce Commission which are presently before the Court is made pursuant to stipulation of February 25, 1954. R. III-1552.

team-track and a platform delivery. Yet the same line-haul rates apply to all New York stations and to all Philadelphia stations, there being no difference in the amount of rate depending on whether an unloading service is rendered. Elimination of the free unloading service previously provided at these specified stations will tend to eliminate an inequitable situation in which some shippers pay an identical rate for less service than is received by others; reduction of the line-haul rate to the stations where the unloading service is provided would preserve the inequity.

The Commission's order, therefore, has not only followed its own well-established judicially approved rule, but it has adequate evidence to support its conclusions. The comment of the Court in *Barringer & Co.* v. *United States,* 319 U.S. 1, 9, is apt:

> "This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

Moreover, it should be remembered that the present reasonableness of the line-haul rate is not, under the Commission's order, put beyond examination in an appropriate proceeding. As the Court said in the

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U. S. Smelting case (339 U.S. at p. 198) in answering the same argument as is here advanced by appellants: "If the carrier makes a double or unreasonable charge, the industry may be heard upon the reasonableness of the rate. 49 U.S.C., §§ 9, 13, 15."

The appellants cite a number of decisions for the proposition that "a carrier should not be permitted to multiply its revenue by merely dividing its rates". Brief for appellant in No. 480, p. 64. The general proposition is not in dispute, but it has no application here. In each of the cases cited, it was found by the Commission that the services to be covered by a separate charge were included in the rate then being paid. For example, in *Unloading Lumber at New York Harbor,* 256 I.C.C. 463 (1943), the report of the Commission states (p. 468): "The present rates on lumber within official territory, and from other territories into official territory, include the services for which charges are here proposed." See also, to the same effect, *Lighterage and Storage Regulations at New York,* 35 I.C.C. 47 (1915); *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.,* 186 U.S. 320. In *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943), the Commission based its disapproval of the additional charges, which included some charges for unloading, on the further fact that charges in the same amount for all ports would create discrimination because of the widely varied terminal services which the carriers supplied at the different ports. The Commission's report stated (p. 682):

> "The equalization of ports, brought about by the absorption of varying terminal costs out of line-haul rates, may be reasonable and nondiscriminatory * * *. It is quite a different matter for the carriers to establish a separate

terminal charge which ignores the wide disparities in the extent of the terminal services performed and the cost of those services, as between different ports, and different docks at the same port, and as between different commodities or classes."

Appellants make frequent reference in their brief to the early Commission decision in *Fruits and Vegetables to Duane St., New York,* 66 I.C.C. 135 (1922). In that case the Commission decided on the basis of the facts then before it that the carriers had failed to justify certain proposed terminal charges. The decision is not controlling on the quite different situation considered by the Commission in the instant case. There are several significant differences in the facts. In the first place, in the earlier case the carriers sought to justify the proposed terminal charges by cost studies that covered services rendered prior to arrival of the shipments at the pier station involved. In the second place, there is a substantial difference between a proposal to establish charges at a single point before such charges became general in Official Territory, and the present situation where the proposal is to extend a general tariff provision to the last two points in that territory which are exceptions to it. Again it is one thing to require the carriers to absorb the terminal service at New York when the cost of those services is low, and quite another to require them to do so when, as the record here shows, the costs have very greatly increased. R. I-23j, 23z, 24r.* Finally,

* The record shows the increase in costs from 1947 to 1949, but there had also been increases before 1947. The Annual Report of the Commission for that year states (p. 41): "Increased operating costs in recent years have fallen with particular severity on terminal operations." 61st Annual Report of the Interstate Com-

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to the extent that the Commission's report may indicate that it was, in 1922, applying a different principle to the consideration of charges for unloading, that early approach has certainly been qualified or overruled by the Commission's later decisions in *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925), and *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947). Insofar as the decision is urged as establishing that *in fact* the line-haul rates included a charge for unloading, that fact certainly does not justify a conclusion that the Commission was in error in concluding on the present record, that the present line-haul rate did *not* include a charge for the unloading service. The decision can only refer to the facts as of 1922, over 30 years ago, and many factors, including a radical increase in unloading costs, have since intervened. As the Court said in *Board of Trade* v. *United States,* 314 U.S. 534, 546:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Appellants also cite a number of cases in which carriers making delivery at New York have urged the additional expense to them of terminal service in support of their division claims against other carriers.

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merce Commission (G.P.O., 1947). The Commission has also noted that these increases have been particularly great at New York and Philadelphia. See Official-Southern Divisions, 287 I.C.C. 497, 542 (1953).

E.g., Erie R. R. Co. v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268 (1925); *Atlantic Coast Line R. Co.* v. *Arcade & A.R. Corp.*, 194 I.C.C. 729 (1933). Obviously, the issues as to the propriety of the division of revenue among carriers have little relevancy to the issues as to whether charges to shippers are just and reasonable; the Commission has "frequently held that divisions have comparatively little probative value in determining the reasonableness of rates". *Florida R.R. Commissioners* v. *A. & R. R.R. Co.*, 144 I.C.C. 603, 621 (1928). Moreover, the divisions apply on all freight consigned to New York and Philadelphia, whether delivered on the piers, or at team tracks where no unloading expense is involved by the carriers (R. II-571, 574, 575), and even under the order of the Commission, the carriers at New York are still required to bear a substantial portion of the unloading costs at the pier stations. R. I-23bb. Finally, in a case decided by the Commission subsequent to its opinion in this proceeding, the Commission fixed the divisions of joint rates on fruits and vegetables from the South and Southwest and in so doing took into account the revenues that the eastern lines would receive under the approved unloading charges at New York and Philadelphia. *Official-Southern Divisions*, 287 I.C.C. 497, 539 (1953); *Official-Southwestern Divisions*, 287 I.C.C. 553, 586-587, 592 (1953).

One more fact should be stated. The loading charges here involved, in the five and a half years in which they have been in effect, have become thoroughly integrated into the entire rate pattern which the Commission has been constructing. In the *Divisions* cases last cited, they were specifically noted by the Commission as an item which reduced the terminal

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expenses of the carriers making deliveries in Philadelphia and New York. 287 I.C.C. 497, 539; 287 I.C.C. 553, 586, 592-593. In the last two general increases authorized by the Commission, it specifically noted the unloading charges and permitted no increases in the charges while allowing increases of various amounts in the line-haul rates. See *Increased Freight Rates, 1948,* 272 I.C.C. 695, 715 (1948); *Increased Freight Rates, 1951,* 280 I.C.C. 179, 191 (1951). It thus appears that in determining the present level of the line-haul rates and the divisions of those rates the Commission has acted on the basis that unloading charges are proper and will continue to be collected by the carriers.

B. THE COMMISSION'S ORDERS DO NOT RESULT IN A CHARGE FOR DELIVERY

Appellants also urge that at the Manhattan pier stations and at the Philadelphia perishable produce platforms unloading is necessary to enable the carriers to make delivery of the freight, and hence that the charges approved by the Commission are in fact charges for the delivery which is already paid for under the line-haul rate. This is essentially the same argument that has been dealt with in Point A, *supra, i.e.,* that the Commission is requiring shippers to make a double payment for the same service. However, since much of the argument in appellants' briefs is directed specifically to the question of delivery, a brief separate discussion of that question is appropriate.

There is no dispute that the transportation duty of the carriers under the line-haul rates covers delivery. But what constitutes proper delivery under the line-haul rates and whether delivery in certain circumstances may be the subject of a separate charge in

addition to the line-haul rate, are questions to be decided by the Commission on the facts of particular situations as they arise. *Los Angeles Switching Case,* 234 U.S. 294; *Swift & Co.* v. *United States,* 316 U.S. 216; *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186.

It should be remembered that in the instant case the unloading operation for which the Commission approved charges is separable in fact from delivery. The freight must first be removed from the car and placed on the station floor; only then is unloading completed. Delivery, however, has not yet begun. After the freight is on the station floor, and only then, is the freight identified, counted and checked, and the bills of lading or other papers marked to acknowledge the delivery to the person entitled to the freight. Actually, the two operations are performed by wholly different people. The Commission's finding on these facts is explicit (R. I-24h):

> "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee."

The Commission's conclusion was based on a careful factual analysis of the operations at the pier stations (R. I-24c-24h), and cannot seriously be challenged. The charges authorized by the Commission are for this separable service of unloading and not for delivery.

It is not disputed that delivery upon a carrier's station platform cannot be provided without first removing the freight from the car and placing it on the platform ready for delivery. The Commission is

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wholly correct in stating (R. I-23g): "The pier floor is the first place where, after the freight has been unloaded, delivery can be taken."

But the fact that the unloading, for which the charge is made, precedes delivery does not mean, as appellants assert, that the charge is made for delivery or that the shippers are being required to pay for something covered by the line-haul rate. The duty of the carriers to make delivery, which is not in dispute, must not be allowed to obscure the further fact that when, as a preliminary to that delivery, a carrier performs additional services in excess of those which it normally provides on like traffic, it is entitled to assess additional charges to recover the cost of providing those special, additional services.*

The basic fallacy in appellants' argument lies in the fact that it refuses to recognize that it is the shippers or consignees, not the carriers, who determine whether

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* Much of appellants' argument is vitiated by their assumption that the word "delivery" has a fixed or absolute meaning and that it is always a synonym for the carriers' obligations under the line-haul rates. This is incorrect. The fact is that the word "delivery" has been used, both in this proceeding and in others, to refer broadly to the entire complex of terminal services performed by the carrier, rather than to the delivery which is contemplated by the line-haul rates. The Commission itself used the word in that sense, for example, in referring to the unloading charges here as "a charge, in addition to the line-haul rate, for making delivery at the New York piers." R. I-23m. "Delivery" in this broad sense, is of course *not* paid for by the shipper in the line-haul rate, and it is clear that additional charges for special services which form a part of that complex of "delivery" services are entirely proper. See, *e.g.*, Allowances for Stacking, 179 I.C.C. 780 (1931); New England Coal & Coke Co. v. N. & W. Ry. Co., 33 I.C.C. 276 (1915).

or not they wish to have the produce delivered after it has been unloaded, or delivered before it is unloaded. The situation at Philadelphia illustrates the matter in its simplest form. The perishable produce terminal of the Pennsylvania contains facilities for both team-track and platform delivery. A shipper or consignee receiving fresh fruits or vegetables at that station may request delivery at the team tracks and do the unloading himself; indeed, the Commission has found that even before the unloading charges first became effective in 1948 most shippers of fresh fruits and vegetables to Philadelphia did precisely that. R. I-24l. On the other hand, if the shipper or consignee desires to have the produce delivered to him at a platform location in the terminal—which requires that it be first unloaded—he may specify that. R. I-23r-23t. Stated simply, th Pennsylvania, at its perishable produce terminal, offers a special type of terminal service which has many advantages for a shipper or consignee (R. I-23s-23t, 23z) and for which, because it includes services which are not available generally for all shippers, it assesses an additional charge to reimburse it in part for the cost of those services. See *Wholesale Fruit & Produce Asso.* v. *A., T. & S. F. Ry. Co.*, 14 I.C.C. 410, 420 (1908); *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I.C.C. 276, 279 (1915). The additional charge is for additional services, not a double charge for the same service. Certainly it is not a charge for delivery as such.

The argument of appellants that because, at the perishable produce terminal platforms, the unloading precedes delivery it is therefore a part of it, is plainly unsound. Many accessorial services for which special

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charges are assessed precede delivery—pick-up and delivery service, storage and switching are examples. Indeed, at all terminals where unloading charges are now in effect—as they have been in most places for many years—and the carrier is asked to perform the unloading, the charge is imposed for a special service *before* delivery. All of these preliminary special services are performed in order to make the freight accessible to the receiver at the place where delivery is requested.*

At New York, as at Philadelphia, the shipper or consignee likewise has a choice between team-track delivery, where he may do his own unloading, or pier station delivery, where the unloading is done by the carriers. The pier stations, unlike the Philadelphia perishable produce terminals, do not have facilities for both platform delivery and team-track delivery, but carriers are not required to offer, and of course do not offer, all types of delivery facilities at each station. The Commission has, in other proceedings, held that the fact that the team tracks serving Manhattan Island are not located immediately adjacent to the piers, and that some of them are located in New Jersey, does not show that the present facilities are inadequate. *Palmer's Dock H. & P. Board of Trade* v. *Penn. R. R. Co.*, 9 I.C.C. 61, 66-67 (1901);

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* Further, even if the conclusion were correct that unloading is a part of delivery, that conclusion does not tend to show that the charges for unloading are unlawful. The unloading is necessary to provide a particular kind of delivery at a particular place and in order to provide that special delivery, not generally accorded to all shippers, the carriers incur additional costs and are entitled to recover those additional costs from those at whose request and for whose benefit the special form of delivery is made.

National Asso. Waste Material Dealers v. *D., L. & W. R.R. Co.,* 98 I.C.C. 606, 612 (1925).

The important fact is that the carriers do have team-track facilities not only on Manhattan Island but elsewhere in the metropolitan area, where the shipper may, if he wishes, take team-track delivery and do his own unloading. For example, there are various team-track facilities in or near Jersey City, to which the rates are the same as the rates to Manhattan, which are available for the delivery of New York traffic of this type. See pp. 48-50, *supra.* In point of fact, however, as at Philadelphia, a substantial number of shippers elected team-track delivery even before those charges became effective in 1948—in 1946, about 40 percent of all fruits and vegetables consigned to New York were unloaded by the consignees. The Commission states (R. I-241): "It is impossible to determine from the record the exact number of shipments unloaded by the consignees at New York proper, but the evidence indicates that the amount thereof is substantial."

As to New York, however, the contention is made, that if every shipper of fresh fruits and vegetables should specify team-track delivery, the team tracks on Manhattan Island—except those of the New York Central—would be inadequate to accommodate all of the freight. The hypothesis is no doubt accurate at Manhattan Island—although it is inaccurate at Philadelphia (R. I-23y)—but it furnishes no warrant for the conclusion that the carriers must therefore assume the entire cost of unloading at the pier stations. The argument rests upon the premise that what the shippers want is team-track delivery on Manhattan Island, and are driven to pier station delivery because of the

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limited team-track capacity at that point. That is a wholly false premise. The appellants are not really interested in or seeking team-track delivery.* The record is totally devoid of any evidence that anyone wanting Manhattan team-track delivery has ever been denied such facilities, but it does contain a considerable amount of evidence that the pier station delivery, with the attendant advantages of using the piers as display rooms and sales marts, is considered highly desirable and even essential by many shippers of fruits and vegetables. See, *e.g.*, R. II-973, 982.

The Commission concluded that the team-track facilities on Manhattan Island will be adequate for the needs of the traffic, since the advantages to shippers and consignees of platform delivery at the pier stations, even when they must assume a portion of the unloading costs, are enough to lead a very large number of them to request pier station, rather than team-track delivery. R. I-23z. There can be no possible justification for the position that the carriers must maintain expensive standby team-track facilities which the shippers do not want in order to justify a charge for an alternative service which the shippers prefer, even with the additional charge.

In this respect the situation here presented is analogous to the situation considered by the Commission

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* This is shown by the fact that the appellants make precisely the same arguments with respect to unloading at Philadelphia that they make with respect to unloading on Manhattan although it is established beyond question that there are adequate team tracks at Philadelphia to accommodate all the fresh fruit and vegetable traffic. What the appellants are seeking in both places is not team-track service but the unloading service and the other advantages which they gain from delivery at the pier stations and at the produce terminal.

in *Swift & Co.* v. *United States,* 316 U.S. 216. There certain shippers wished to consign livestock to the Union Stock Yards in Chicago because of the particular advantage to them in receiving the livestock at that point. This Court sustained the Commission in concluding that the unloading pens of the stock yard company were suitable points at which to terminate the transportation duty of the carriers to the consignees, notwithstanding the fact that the consignees were required by the stock yard company to pay a separate yardage charge on the livestock thus unloaded. The Court stated (316 U.S. at p. 227):

> "Some stock is and can be delivered at team tracks and some at industrial sidings. These facilities are inadequate for handling the entire volume of direct shipments. It does not appear, however, that the existence or adequacy of alternative facilities for delivery at other points is particularly important in the case, because the shipments involved are consigned to the packers at the Union Stock Yards by their own choice."

Similarly, here, when shippers or consignees do in fact elect pier station delivery they cannot be heard to object to an extra charge due to the extra cost of delivery at that station, simply because there are not enough team tracks on Manhattan Island to accommodate all shipments *if* all shippers elected that form of delivery. Moreover, the Court in the *Swift & Co.* case emphasized that in determining the carriers' obligation to make delivery, "the propriety of the yardage charges * * * was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law." (316 U.S. at p. 225).

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There is no doubt that the situation with respect to shipments consigned to the pier stations on Manhattan Island is unusual if not unique. Many former decisions of the Commission have recognized that fact. See, *e.g.*, *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 52 (1915); *Constructive and Off-Track Stations*, 156 I.C.C. 205, 222 (1929). But for precisely that reason it called for an exercise of the judgment of the Commission. The Commission has made a judgment, and stated its reasons (R. I-23z-23aa):

> "* * * Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation. Adequate team tracks at respondents' other stations on Manhattan might constitute sufficient answer to protestants' contention. Although it seems that such existing team tracks could handle all of the fruit and vegetable traffic which now moves through the pier stations, there is little likelihood that the shippers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. Respondents are under no obligation to provide an excessive amount of terminal service or a particular type of service for which there is no reasonable expectation that it will meet a public need. Moreover, it is conceivable that if terminal costs cannot be kept within reasonable bounds respondents might eventually be forced, as they

> have intimated, to undertake the establishment of team-track facilities in Jersey City within a reasonable trucking distance of lower Manhattan as a substitute for direct service to the latter area." *

We submit, therefore, that at New York, as well as at Philadelphia, the nature of the facilities maintained by the carriers does not deprive the Commission of power to enter its order approving the unloading charges, nor does it deprive that order of adequate justification.

C. THE ORDER OF THE COMMISSION FIXING THE SAME LEVEL OF CHARGES AT BOTH NEW YORK AND PHILADELPHIA IS SUPPORTED BY THE EVIDENCE

The Secretary of Agriculture, appellant in No. 480, assigns as a further objection to the Commission's order (brief, pp. 18-19, 77-82) that it approves the establishment of identical unloading charges at New York and Philadelphia, although the Commission found (R. I-23d, 24s) that the unloading costs are lower at Philadelphia. The report of the Commission states (R. I-23bb):

> "As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points."

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* That the Commission fixed the level of the unloading charges substantially below the unloading costs to the carriers in order to avoid excessive movement of traffic away from the pier stations is clear from its report (R. I-23bb): "* * * it is probable that *continuance of the present charges* [*i.e.*, the 1948 charges] will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense." (Italics supplied.)

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The prior report had indicated that such a parity was "because of the long-standing competitive relation between the cities." R. I-24r. On matters such as this the Commission has of course very wide authority and discretion. *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U.S. 199, 220-221; *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344; *Ayrshire Corp.* v. *United States,* 335 U.S. 573, 593.

The evidence fully supports the Commission. Perhaps the most cogent evidence of the undesirability of creating a disparity between the two cities is that the appellants in No. 481, who represent many diverse groups, make no criticism of the order on this ground.* Indeed, the Commission found (R. I-23u):

> "Produce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia."**

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* Counsel for the Port of New York Authority recognized the need for equal charges by stating during the hearing that if there was to be a charge for unloading he was opposed to any lower charge for unloading at Philadelphia than at New York. R. III-1020-1021.

** This finding is based on the testimony of a witness for the appellants who testified (R. III-1122): "An area of competition exists between Philadelphia and all of its surrounding major terminals, that is, that group of receivers who are midway between." The witness stated that 40 percent of the total volume of perishables moving to Philadelphia were moved thence to points ouside that city within a radius of 100 to 150 miles. R. III-1091. Within such an area there are of course many purchasers who could purchase their perishables as well from New York as from Philadelphia.

Apart from these findings of the Commission, two other matters should be noted. First, and perhaps more important, is the fact that at *neither* New York nor Philadelphia did the Commission permit the carriers to recover their entire costs. See Statement, *supra,* pp. 12, 15. At both points, shippers are still receiving, under the unloading charges fixed by the Commission and now in effect, a special service at *less* than its actual cost. What the Commission in fact has done, therefore, is to require the carriers to absorb a greater portion of the unloading cost at New York; it has not, by any averaging process, required shippers to Philadelphia to help pay the greater costs of unloading at New York. As the Commission stated in *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673, 682 (1943):

> "The equalization of ports, brought about by the absorption of varying terminal costs out of the line-haul rates, may be reasonable and nondiscriminatory * * *."

Second, the fact is that the order of the Commission does not *disturb* the relationship between New York and Philadelphia, but rather *preserves* it. Formerly the unloading was free at both points; now it is subject to identical charges. That these two points were, together, the *last* two points in Official Territory at which unloading was previously performed by the carriers with no charge in addition to the line-haul rate is itself persuasive evidence that a competitive relationship exists between the two points and that they should be treated alike.

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III

THE ORDER OF THE COMMISSION DOES NOT RESULT IN DISCRIMINATION OR UNDUE PREFERENCE IN VIOLATION OF EITHER SECTIONS 2 OR 3 OF THE ACT

None of the complaints filed in the court below asserted that the order of the Commission violated Sections 2 or 3 of the Act (see, *e.g.*, R. I-18-20, 122-123, 148-150), and in consequence the contention was not considered by the majority of that court.* Even if it is assumed, however, that the argument is available here (see *Montana Railway Co.* v. *Warren*, 137 U.S. 348, 351), it is without substance.

Section 2 of the Act proscribes "any special rate" which is greater or less than the charge to any person for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Section 3(1) of the Act similarly prohibits any carrier from subjecting "any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever, * * *." The contention here is that these sections are violated because the carriers published, in the first instance, unloading charges only for fresh fruits and vegetables, which constitute the bulk of the traffic received at the Manhattan Island piers and the Philadelphia perishable produce platforms, and deferred publication of similar charges on other traffic, which is likewise unloaded at the stations by the carriers without charge in addition to the line-haul rates. R. I-24b.

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* It was, however, adverted to by the dissenting judge. R. I-205-206.

Questions under Sections 2 and 3(1) of the Act are peculiarly within the province of the Commission. In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, the Court said (p. 304):

> "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon application of all the facts and circumstances affecting the traffic."

In exercising that jurisdiction, the Commission has uniformly insisted upon "all the facts and circumstances", rather than merely the general statements of disparity of treatment such as are now contained in appellants' briefs. For example, in *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.,* 172 I.C.C. 319 (1931), the Commission said (p. 333):

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference."

Even more directly applicable here, in view of the argument made by appellant in No. 480 (brief, p. 82) that many perishable agricultural commodities other than fresh fruits and vegetables delivered at the Manhattan pier stations are not now assessed an unloading charge, is the decision of the Commission in *Fort*

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Smith & W. Ry. Co. v. *Atchison, T. & S.F. Ry. Co.*, 216 I.C.C. 411, 433 (1936):

> "Complainants claim also that the denial of the transit privilege on canned goods and dried fruits while the arrangement is accorded to several other highly competitive food products in the all-rail service results in undue prejudice to the former and undue preference to the latter. * * * Complainants have not shown the extent and effect of such competition. They have presented no evidence concerning the relative value of these commodities or the rates applicable thereon. Nothing is shown as to the volume of movement or transportation characteristics. The mere fact that a commodity competes with other specified commodities, without evidence as to the transportation characteristics of the alleged preferred commodities, is insufficient to support an allegation of undue prejudice."

See also, *e.g.*, *Kohler Co.* v. *Alton & S.R.*, 263 I.C.C. 667, 672 (1945); *Rockford Brick & Tile Co.* v. *Chicago & N. W. Ry. Co.*, 251 I.C.C. 235, 238 (1942); *J. G. Hoffstot* v. *Monongahela Ry. Co.*, 248 I.C.C. 248, 254 (1941); *Traffic Bureau, Lynchburg Cham. of Com.* v. *C. & O. Ry. Co.*, 234 I.C.C. 765, 768 (1939); *American Agricultural Chemical Co.* v. *Aberdeen & R. R. Co.*, 225 I.C.C. 610, 628 (1937). There are no suggestions in any opinion of this Court that the Commission must or should be satisfied with less evidence than it now requires; indeed, the decisions which recognize the Commission's exclusive responsibility in the field, by emphasizing the complexity of the facts and the importance of value judgments, underscore the necessity for a full factual basis for any finding of discrimination or undue prejudice. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304; *Barringer* v. *United*

States, 319 U.S. 1, 11; *Chesapeake & Ohio Ry. Co.* v. *United States,* 296 U.S. 187, 188; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U.S. 57, 62.*

Appellants did not even attempt to make the showing required by the Commission's decisions. There was no evidence offered, for example, that consignees of other commodities which are also unloaded at the pier stations enjoyed the numerous and substantial benefits enjoyed by consignees of fresh fruits and vegetables in having the pier as a sales mart where they display and sell this merchandise. There was thus no showing of a "like and contemporaneous service", as required under Section 2. There was no showing that the other commodities which are unloaded by the carriers without charge constitute "a like kind of traffic" or that they are handled "under substantially similar circumstances and conditions." Nor was there any showing that the other commodities moved over the same lines or for the same distances. All of these matters are essential to a showing of a violation of Section 2.** Nor did appellants make the showing of competition required to establish a violation of

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* In the Barringer case the Court stated (319 U.S. at p. 10): "It [the Commission] has passed only on the question of discrimination or preference resulting from the remission of the loading charge. *In doing so it has, as § 2 contemplates, looked at all the relevant circumstances and conditions,* * * *." (Italics supplied.)

** On the question of like kinds of traffic see Traffic Association of St. Louis Coffee Importers v. Illinois Central R. R. Co., 28 I.C.C. 484, 487 (1913); California Citrus League v. Director General, 58 I.C.C. 373, 392 (1920). For the requirement that the movement must be over the same lines and for the same distance see R. C. Williams & Co., Inc. v. New York Central R. Co., 269 I.C.C. 297, 300 (1947); Tide Water Oil Co. v. Director General, 62 I.C.C. 226, 227 (1921); Wight v. United States, 167 U.S. 512, 518.

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Section 3. See *Tide Water Oil Co.* v. *Director General*, 62 I.C.C. 226, 227 (1921).

Appellants' failure to present evidence was not the result of lack of opportunity nor was it due to any misunderstanding of the quantum or nature of the proof required. The first report of the Commission in 1948, in rejecting the contention that Sections 2 or 3 of the Act would be violated by the unloading charges on fresh fruits and vegetables, expressly stated (R. I-24r): "Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables." * Yet when the rehearing was granted, appellants made no effort to establish the similarity of circumstances and conditions necessary to support a finding of a violation of these sections. The inference, indeed, is warranted that such proof does not exist. In any event, the Commission was wholly correct in concluding, in its second report in 1952 (R. I-23bb) that, "The record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of that act."

Another answer, which is equally dispositive of appellants' contention, is that the carriers had indicated as early as the first hearing in this proceeding that they were considering the publication of similar un-

* The brief for appellant in No. 480 relies (pp. 81-82) upon the finding of the Commission (R. I-23f) that in the "movement of freight" and the "unloading of such freight to the pier platform" the handling of fruits and vegetables and other freight is identical. The finding is, however, limited to the physical facts of car-floating and unloading, and does not in any way suggest that the shippers of other freight receive the many benefits to the shippers of fruits and vegetables arising from the use of the pier as a sales mart for such products.

loading charges on other traffic (R. I-24b), and that in fact in 1950 they did publish such charges to cover all freight unloaded by them at Philadelphia. R. I-322. These additional unloading charges at Philadelphia were also approved by the Commission. *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The Commission, therefore, was fully warranted in rejecting, on either or both grounds, the contention that its order sanctioned, in any way, a violation of Sections 2 or 3. If the point is properly before the Court, it is without merit.

IV

The decision of the Commission is not deficient on any procedural ground

In the court below, appellants urged several alleged violations of procedure or due process in connection with the proceedings before the Commission. In their briefs in this Court those charges are mentioned only incidentally, if at all, although some of them are reflected in the Assignments of Error. In any event, they are without substance.

1. Appellants urged below that they were given no opportunity to be heard specifically upon the reasonableness of the reduced rates approved by the Commission in its final report. R. I-23bb. The answer given by the court below is all that needs be said (R. I-214-215):

> "Having just completed a thorough investigation of the entire subject, during which plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of

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and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the defendant could not complain of a denial of due process because he was not again heard on his liability for $500. Akron C. & Y. Ry. Co. v. United States, 22 Fed. (2) 199, 203."

2. The contention has also been made that the Commission erred in dismissing, by its order of December 15, 1952 (R. I-26-27), the complaints filed subsequent to the Commission's final report attacking the reasonableness of the unloading charges as finally approved. This is essentially the same argument as that just discussed, and the answer given by the court below is equally applicable. After motions to dismiss, and responses thereto, had been filed, the Commission entered an order reciting that the complaints "assail on substantially the same grounds the unloading charges approved in said report"; that "the circumstances and conditions with respect to the approved unloading charges have not materially changed since substantially the same issues were decided by the Commission"; and that "no reasonable grounds appear for further investigation of such charges or investigation of the matters in connection therewith". The refusal to order a further hearing was, in other words,

both sensible and proper. Section 13(1) of the Act provides:

> "If * * * there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

The Commission has taken similar action many times in the past. See, *e.g., Traugott Schmidt & Sons* v. *M.C.R.R. Co.*, 23 I.C.C. 684, 685 (1912); *Alabama Asphaltic Limestone Co.* v. *Akron & B.B. R. Co.*, 194 I.C.C. 273, 275 (1933). Indeed, even in the absence of such a provision, an administrative body has an almost unqualified discretion in determining whether a further hearing shall be granted. See *Halcston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (9th Cir. 1951); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535. See also *United States* v. *Interstate Commerce Commission*, 294 U.S. 50, 60; *George Allison & Co.* v. *Interstate Commerce Commission*, 107 F. 2d 180, 182 (App. D.C. 1939).

3. The brief for appellants in No. 481 suggests (pp. 41-42) that the Commission failed to require the carriers to assume the burden of proof, citing Section 15(7) of the Act. That section provides:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *."

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Appellants' complaint, however, is not that the carriers failed to assume, and discharge, the burden of proving that the proposed unloading charges were reasonable. This they did. Appellants, rather, argue (brief in No. 481, p. 42) that the railroads could not justify the unloading charge "except by sustaining 'the burden of proof' of showing that their line-haul rates are inadequate". The contention, therefore, is no more than a different statement of the contention that the Commission was required to make a complete investigation of the reasonableness of the line-haul rates before approving the unloading charges, and the answer is the same as that already given in Point II, *supra.*

4. Finally, appellants rely in their briefs to a considerable extent on the reports of the Hearing Examiners and urge that the Court should consider their findings. There is no merit in the suggestion. The findings and conclusions of the Hearing Examiners are advisory; the only relevant decisions are the reports of the Commission itself. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 285-286; *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. 2d 268, 272-273 (3rd Cir. 1944); *Inter-City Transp. Co.* v. *United States*, 89 F. Supp. 441, 445 (D.N.J. 1948); *C. E. Hall & Sons, Inc.* v. *United States*, 88 F. Supp. 596, 600-601 (D. Mass. 1950).

CONCLUSION

Wherefore, the judgment of the court below should be affirmed.

Respectfully submitted,

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